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No.

IN THE

Supreme Court of the United States

October Term, 1985

JEFFREY R. MACDONALD,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

I. Is the integrity of the federal judiciary undermined where the prosecution and trial court withheld information prior to trial which would have revealed the existence of a familial relationship between the judge and a prosecuting attorney previously responsible for that case, and, when that relationship and role is discovered by petitioner after trial, the judge insists upon ruling upon the recusal motion himself rather than ordering a hearing by another court?

II. Did the Court of Appeals ignore the decision of this Court in *Maine v. Moulton* in upholding the lower court's decision that it was constitutionally permissible for a government investigative agent, acting under the guise of being an impartial psychiatrist, to examine petitioner during trial without counsel, resulting in the exclusion of petitioner's psychiatric defense?

III. Did the Court of Appeals err in refusing relief where petitioner (1) demonstrated that the government withheld, suppressed, and even destroyed and lost potentially exculpatory evidence, and (2) also presented substantial after-discovered evidence, any combination of which could have resulted in a different jury verdict?

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Opinion Below.

The opinion of the Court of Appeals for the Fourth Circuit is reported at 779 F. 2d 962 (4th Cir. 1985) and is reproduced beginning at page 1a of the Appendix to this Petition (App. A, pp. A-1).

Jurisdiction.

The judgment of the Court of Appeals was entered on December 17, 1985, and a timely Petition for Rehearing and Suggestion for Rehearing In Banc were denied

on January 27, 1986 (A. A-10). The jurisdiction of this court is invoked under 28 U.S.C. §1254(1)(1976).

Constitutional and Statutory Provisions Involved.

The Fifth Amendment of the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment of the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

28 U.S.C. §144 (1949) provides:

Bias or prejudice of judge

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit

that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.
(As amended May 24, 1949, c. 139, §65, 63 Stat. 99.)

28 U.S.C. §455 (1974) provides in its applicable sections:

Disqualification of justice, judge or magistrate

(a) Any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

* * *

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be

substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person;

(i) Is a party to the proceeding, or an officer, director or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee and guardian;

* * *

(e) No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any

ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(As amended Dec. 5, 1974, Pub. L. 93-512, §1, 88 Stat. 1609; Nov. 6, 1978, Pub. L. 95-598, Title II, §214(a), (b), 92 Stat. 2661.)

STATEMENT OF THE CASE

A. Introduction

Beginning in the damp early morning hours of February 17, 1970 at Fort Bragg, North Carolina, with the brutal murders of Petitioner's pregnant wife and two young daughters, the case of *United States v. MacDonald* has become one of the most controversial and litigated criminal cases in the history of the federal judicial system.

Dr. Jeffrey MacDonald, Petitioner herein, schooled at Princeton University, and Northwestern Medical School, and was serving as a surgeon in the Green Berets of the United States Army on that fateful night.

When interviewed before and after rescuscitation while being treated for wounds he himself had sustained, MacDonald claimed that a group of assailants had entered his home, murdered his family, and assaulted him.

Members of the United States Army Criminal Investigation Division assigned to investigate the case immediately focused their investigation upon Captain MacDonald as their only suspect. Despite the existence of witnesses who had seen persons matching MacDonald's descriptions of the killers near the scene of the crime at approximately the same time the crimes occured, these leads were never fully investigated.

In April of 1970, formal charges were instituted by the military authorities and, after the most extensive pretrial hearing in the history of the Army, the Hearing Officer concluded that the charges against Dr. MacDonald were "untrue." All charges were dropped and MacDonald was honorably discharged from the Army in December of 1970.

Following strong criticism by the Hearing Officer of their conduct in this case, Army investigators attempted to have the United States Attorney in North Carolina reopen the matter and charge MacDonald under Federal

Law. Despite strong recommendations for indictment by Jimmie C. Proctor, the assistant United States Attorney assigned to the case, the United States Attorney refused to prosecute.

This matter was subsequently referred to the Justice Department in Washington for review. After several years of reviews which concluded that there was insufficient evidence to bring Petitioner to trial, Victor Woerhide, the assistant assigned to the case, eventually succeeded in having a grand jury empaneled in 1974. In January 1975 MacDonald was indicted and the case was assigned to the Hon. Franklin T. Dupree. Motions to dismiss the indictments on speedy trial grounds were filed and denied. The Fourth Circuit Court of Appeals overturned Judge Dupree's order and the government appealed to this Court.

This Court, for procedural reasons, reversed the Fourth Circuit's initial holding that MacDonald was denied a speedy trial, *United States v. MacDonald*, 435 U.S. 850 (1978), reversing 531 F.2d. 196 (4th Cir. 1976).

Despite dozens of requests for pre-trial discovery and inspection, the lower court permitted the government to withhold from the accused tens of thousands of documents contained in their files. The government's refusals to provide discovery necessitated an extraordinary pre-trial appeal to the Fourth Circuit which finally was resolved with the government agreeing to furnish some discovery.

This case went to trial in 1979 before Judge Dupree and Petitioner was convicted of three counts of murder.

Upon appeal, MacDonald claimed, among other reasons, that he was denied a fair trial in that the lower court had refused to permit expert psychiatric testimony on his behalf; had refused to permit him to fully explore the confessions of Helena Stoeckley (who had admitted on several occasions that she was present with the group of persons who did commit the crimes); and that the

"scientific" circumstantial case presented by the government was fatally flawed.

After the trial, this Court reversed a second Fourth Circuit holding that MacDonald had been denied a speedy trial.[1]

B. Facts Pertinent to this Appeal

Following MacDonald's conviction, he attempted to obtain documents contained in the government's investigative files which had been withheld prior to trial. Numerous requests were made employing the Freedom of Information Act and eventually a small amount of documents began to be released.

In 1983, petitioner obtained documents which revealed that the government and lower court had withheld documents and information which would have revealed that Jimmie C. Proctor, the assistant U.S. Attorney who had been pressing his superiors for MacDonald's indictment in 1970, had been the son-in-law of Judge Dupree.

These documents further revealed that the government had withheld from the defense the information that the psychiatrist who had examined MacDonald during the trial, (Dr. Brussel) had been acting as an investigative criminologist for the government since 1971, and had concluded that petitioner was guilty *eight years before the trial.*

Other documents revealed the existence of several items of critical physical evidence which had been lost or destroyed by the government and, more ominously, reports concerning them had been withheld from the defense.

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1. 456 U.S. 1 (1982) reversing 632 F.2d 258 (4th Cir.) rehearing denied by an equally divided court, 635 F.2d 1115 (4th Cir. 1980) (in banc.)

In addition, F.O.I.A. materials showed that the Government had in their files numerous reports of law enforcement officials that from 1969 to 1971 Helena Stoeckley had been an "outstanding" reliable informant during the time she had admitted being present with others who had murdered Petitioner's family.

After conviction, an independent investigation was undertaken by investigators who were former law FBI agents and police detectives. This investigation turned up at least 35 witnesses who had information about the group described by MacDonald as the killers of his family.

Petitioner filed motions for relief under 28 U.S.C. §2255, a motion for new trial under Rule 33 F.R.Cr.P., and a motion under 28 U.S.C. §455 to have the trial judge recuse himself.

After the denial of the Recusal motion by Judge Dupree, Jimmie C. Proctor made statements to their home town newspaper further expounding upon his role in this case and a motion to reconsider the recusal motion was filed and denied by Judge Dupree. All motions were denied and a timely appeal was filed with the United States Court of Appeals for the Fourth Circuit. That appeal was denied on December 17, 1985 and the Motion for Reconsideration denied on January 27, 1986.

Reasons for Granting the Writ

1. The Integrity of the Federal Judiciary is Undermined Where the Prosecution and Trial Court Withhold Information, Prior to Trial, Which Would Have Revealed the Existence of a Familial Relationship Between the Judge and Prosecuting Attorney Previously Responsible for That Case, and When That Relationship and the Extent of Participation is Discovered After Trial, and a Recusal Motion is Filed, the Judge Insists Upon Ruling Upon the Recusal Motion Himself Rather Than Ordering a Hearing by Another Court.

The rule that a judge whose impartiality has been challenged may not decide the merits of a motion that he recuse himself and that, if he nevertheless does decide the motion, he exceeds his jurisdiction, has been codified in 28 U.S.C. §144 and §455 and enforced by this Court. See *Offutt v. United States*, 348 U.S. 11 (1954); *In re Murchison*, 349 U.S. 133, (1954); *Tumey v. Ohio*, 273 U.S. 510, 532 (1927); *Berger v. United States*, 255 U.S. 22, (1921); Note, *Disqualification of Judges for Bias in the Federal Courts*, 79 Harvard L. Rev. 1435 (1966).

The decision of the Court of Appeals in the instant case completely ignores both the Laws of the United States and the decisions of this Court.

In the case at bar, not only were the facts concerning the familial relationships of the trial court to a prosecuting attorney once responsible for this proceeding withheld from Petitioner prior to trial, but, once discovered in prosecution files by F.O.I.A. requests years later, the trial judge insisted on deciding the issue himself.[2]

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2. Despite the issues of fact concerning Proctor's true role in this case; what knowledge the judge had received from other members of his family; direct or contingent responsibilities of the trial court for a grandchild who bore Proctor's name; his failure to provide

It is submitted that the withholding of that information before trial and the conduct of the trial court judging his own case when recusal was requested in itself raises serious questions as to the "appearance of justice" required by this Court. *In re Murchison, supra*, 349 U.S. at 136.

In considering that (1) petitioner had to fight for eight years (1975-1983) to obtain from the government files the bits and pieces with regard to the recusal and other issues contained in this appeal, (2) to this date the prosecutors still refuse to release tens of thousands of pages of information relating to this case, and, (3) the fact that Judge Dupree severly restricted pre-trial discovery by Petitioner,[3] an even more sinister aspect is added to this case.

The few documents obtained to date clearly show that from virtually the beginning of the case in 1970, Jimmie C. Proctor, an assistant United States Attorney from Fuquay-Varina, North Carolina was assigned by his office to this matter. Even during the army hearings he

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full disclosure on the record prior to trial of these relationships; the credibility of Proctor with regard to his initial affidavit and statements to the press following the denial of the recusal motion (See footnote 5); also the question of the credibility of the trial court itself inferring that he had no knowledge of the role of his son-in-law in the most famous case of both of their careers.

It is almost inconceivable that a member of this Court would not recuse himself or herself under similar circumstances without the need of a recusal motion. At least a member of this Court would give notice of the facts which might be the basis for recusal and not decide the matter himself or herself if such a motion was filed.

3. Judge Dupree's refusal to order the government to provide a list of names and addresses of witnesses necessitated an appeal to the Fourth Circuit Court of Appeals. The prosecution's refusal to comply with 29 written requests to examine physical evidence resulted in defense experts only having days before trial to examine evidence in the possession of the government for nine years. Judge Dupree's refusal to allow the defense to see a 13 volume prosecution report on this case before trial in all likelihood is the reason for this appeal.

took an active role in representing government witnesses and working with army prosecutors. At that time he was married to the daughter of Franklin T. Dupree another attorney residing in Fuquay-Varina, and the father of the Dupree's grandchild.

After the charges by the Army against MacDonald were dropped, Proctor immediately began taking steps to present the case to a federal grand jury. He requested the FBI to "eliminate any possibility" that Helena Stoeckley be a possible suspect in the case and that other witnesses be "interviewed to establish an alibi" for Stoeckley. (letter dated November 2, 1970).

Shortly thereafter Proctor wrote to Staff Judge Advocate requesting preservation of all evidence so that "in case of new developments this office will be in a position to try the defendant." (letter dated November 16, 1970).

In another document obtained by MacDonald in 1983, a detailed report of a meeting of CID investigators and Proctor reveals Proctor conspired with the agents to try to force the United States Attorney to cooperate with them and offered to secretly turn over to them Justice Department materials which he had assembled "anticipating trying MacDonald." According to this report, Proctor offered to do so illegally if the United States Attorney refused their request. This document related that Proctor ". . . would have been the attorney who would have tried the MacDonald case."

This report further stated that contrary to the findings of the hearing officer who criticised the investigators in the case, Proctor ". . . felt that the CID did an outstanding job," and was pressing for the arrest of MacDonald's lawyers after they had been assaulted by CID agents. (Report of telephone conversation between CID agents on December 31, 1970.)

None of the documentation prepared by Proctor "in anticipation of trying MacDonald" has ever been turned over to the defense in this case.

Franklin T. Dupree was appointed to the United States District Court approximately two months before Proctor resigned as an assistant United States Attorney in February of 1971. While Proctor was divorced from Judge Dupree's daughter on July 27, 1972, he has remained responsible for the support of the trial court's grandchild throughout the pendency of this case.

Judge Dupree was assigned to this case in 1975 and was called upon by the government to make rulings which effectively foreclosed the defense from discovery prompting an extraordinary appeal to the Court of Appeals. This appeal of Judge Dupree's refusal to grant discovery finally resulted in the government turning over limited information to the defense. Thus, the information concerning Proctor's role in this case and relationship to the court was intentionally withheld from the defense by the prosecutors with Judge Dupree's tacit approval.

The finding by the Court of Appeals that the divorce of Proctor from Judge Dupree's daughter "left no vestige of the taint requiring the trial court to disqualify himself at the time of trial in 1979 or at the time the post convictions came on for a hearing in 1984," is a superficially incorrect interpretation of a serious challenge to the integrity of our federal judiciary and cannot be permitted to stand for several reasons.

First, the withholding of information as to the trial court's relationships (now former father-in-law and grandfather to Proctor's and his daughter's child) in 1975 when Judge Dupree was assigned to the case, taints all subsequent rulings by him. This was not a case where a relative of the trial judge happened to be a member of a law firm involved in a pending case, where that relative had nothing to do with the case. Even in that instance, our courts have suggested even such a tenuous tie might cause the "appearance of partiality" See *SCA Services v. Morgan*, 557 F.2d 110, 116 (7th Cir. 1977) *Rice v. McKenzie*, 581 F.3d 1114 (4th Cir. 1978;

Potashnick v. Port City Construction Co. 609 F.2d 1101, 1112 (5th Cir. 1980).

Secondly, the defense of this case is based in large measure upon the defense that the government throughout this case has at times both negligently and willfully failed to pursue the real killers of his family, including Helena Stoeckley — not just that the Petitioner is innocent. Therefore, if MacDonald's claim was upheld, those participating in this miscarriage of justice — including the father of Judge Dupree's grandchild, Jimmie C. Procter — would be responsible for not only accusing an innocent man, but allowing vicious killers to walk free.

Thirdly, as a result of Judge Dupree's denial of discovery, the defense was foreclosed from presenting the admissions and confessions of Helena Stoeckley in a convoluted interpretation[4] of Fed. R. Evid. Rule 804(b)(3) in which he found that at the time of trial Helena Stoeckley was "a pathetic figure" whose statements were inherently untrustworthy, *United States v. MacDonald*, 485 F. Supp. 1087 (E.D.N.C. 1979).

Fourthly, the refusal of the trial court to order a full hearing before another judge on the recusal issue when it was raised not only flies directly in the fact of the clear wording and intent of 28 U.S.C. §144, but it also shows a conscious attempt to prevent a full and impartial tribunal from probing all of the facts concerning the recusal issue, including the credibility of the trial court. This conduct, in itself, raises serious questions as to the "appearance of impropriety" of the trial court.

Fifthly, compounding this questionable refusal is the fact that, after Judge Dupree denied the recusal motion and was considering the other post-trial requests for relief, Proctor was quoted extensively in their

4. For a detailed criticism of this ruling, *Note, The corroboration requirement of Federal Rule of Evidence 804(b)(3), United States v. MacDonald: How Things Should Not Work*, 131 U. of Pa. L.Rev. 999 (1983).

home-town newspaper expounding upon his role [5] in the case in direct contravention to the government's claim and affidavits that he played a minimal role in this matter.

Sixthly, the failure to have an independent tribunal placed Judge Dupree in the unenviable, but, to him, perfectly acceptable position, of ruling upon the recusal motions and deciding on the credibility of himself and the father of his grandchild.

The decision of the Court of Appeals ignores the fact that our federal practice is based upon both Statutes 28 U.S.C. §144 and §455 which embody the common law

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5. The quotations hereunder are from *The Independent*, Fuquay-Varina, North Carolina, November 28, 1984, during the period Judge Dupree was considering the motions upon which this appeal is based.

"Proctor was deeply involved with the investigation of the MacDonald case from the beginning. As assistant U.S. Attorney in the eastern division of North Carolina and chief of the criminal division, he personally supervised the Fayetteville division.

"On the day the three murders occurred at Ft. Bragg, he was in the Virgin Islands, assisting in the trial of a murder case. As soon as he returned he was briefed on the MacDonald case by FBI Agent Bob Caverly, who, on the basis of MacDonald's initial statement to him at the hospital on the night of the murders, named MacDonald as a suspect.

"On the basis of briefings by Caverly and others involved in the initial investigation Proctor said, *'We all agreed MacDonald was the one'*."

* * *

"For a time Proctor said, he was going to Washington every two or three weeks, taking new evidence. He talked to Victor Woerheide, Justice Department prosecutor, and convinced him that he had a case against MacDonald."

* * *

"Proctor said Woerheide kept saying he knew MacDonald was guilty but he continued to point out the problems with bringing the case to trial.

" *'We begged, pleaded, even threatened to resign', Proctor recalls, adding with a chuckle, 'I was young then'*."

* * *

principal that no one may be the judge of his own cause. This principal can be traced back to the famous decision of Sir Edward Coke in *Dr. Bonham's Case* 8 Co. Rep. 114a, 2 Brownl. 255 (1610). This Court, in *In Re Murchison*, supra, 349 U.S. at 136, (1954), said,

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be the judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This court has said, however, that "every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." *Tumey v. Ohio*, 273 U.S. 510, 532 (1927). Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But, to perform its high function in the best way "justice must satisfy the appearance of justice." *Offutt v. United States*, 438, U.S. 11 (1954).

Furthermore, what the court of Appeals failed to appreciate is that the normal standards of appellate review are rendered inappropriate by the trial judge having acted in his own cause. As this Court clearly said in *Berger v. United States, supra*, in holding that once it appears that the allegations of bias and prejudice are made, the challenged judge must proceed no further:

> "[T]he reason is easy to divine. To commit to the judge a decision upon the truth of the facts gives

chance for the evil against which the section is directed. The remedy by appeal is inadequate. It comes after the trial, and if prejudice exists, it has worked its evil and a judgment of it in a reviewing tribunal is precarious. It goes there fortified by presumptions and nothing can be more elusive of estimate or decision than a disposition of a mind in which there is a personal ingredient." *Id.* 255 U.S. at 36.

2. THE COURT OF APPEALS IGNORED THE DECISION OF THIS COURT IN *MAINE V. MOULTON* IN UPHOLDING THE LOWER COURT'S DECISION THAT IT WAS CONSTITUTIONALLY PERMISSIBLE FOR A GOVERNMENT INVESTIGATIVE AGENT, ACTING UNDER THE GUISE OF BEING AN INDEPENDENT PSYCHIATRIST, TO EXAMINE PETITIONER DURING TRIAL, WITHOUT COUNSEL BEING PRESENT, RESULTING IN THE EXCLUSION OF PETITIONER'S PSYCHIATRIC DEFENSE BASED UPON THAT EXAMINATION.

Some of the most, if not the most, critical testimony which the Petitioner sought to introduce at trial was expert psychiatric testimony. In 1970 when the charges were originally dismissed, the Hearing Officer had relied heavily upon the fact that not only had MacDonald's psychiatric experts testified that he was not mentally capable of having committed these crimes, but also several psychiatrists designated by the prosecution had concurred in that opinion, finding MacDonald sane and normal, with no evidence of psychopathic or sociopathic tendencies.

During trial, when the defense sought to introduce this testimony, the prosecutor's objected and Judge Dupree ruled that the government should be permitted to have another psychiatrist examine MacDonald before he would decide whether to admit the defense testimony.

Unknown to MacDonald, trial counsel, and the court, the person whom the prosecutors designated to

perform this examination had been an integral part of the prosecution team since 1971 (eight years before trial) and had already concluded that MacDonald was guilty.

Dr. James A. Brussel was employed by the government as early as February, 1971 and was working with investigators as an investigating criminologist. According to the few documents obtained in 1983 under the Freedom of Information Act, Brussel was furnished investigative data and autopsy reports and served as a investigative criminologist for the government with regard to all aspects of the physical scene of the crime.

To date the government has refused to furnish any reports of scientific studies performed by Dr. Brussel, but the documents obtained after trial indicate an intricate role in assisting army investigators building a hypothetical case against MacDonald.[6]

Not only did the prosecutors withhold information concerning Brussel's true role from the defense, but the trial court never had this information in evaluating the credibility of the information supplied to him *in camera* with regard to Brussel's psychiatric examination.

This withheld information both foreclosed the defense from objecting to the propriety of Brussel examining MacDonald, and also thereafter challenging his

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6. According to reports obtained in 1983, Dr. Brussel investigated and advised the government from February 7, 1971, on the following matters:

Pathology reports, motive, hippie conduct, use of drugs, types of weapons normally used by hippies, types of blows which would be normally inflicted by hippies, style of walk of hippies, types of gloves used for dishwashing, reason why MacDonald killed his children, injuries to Mrs. MacDonald, reconstruction of the crime scene, and others.

It must be noted that to date the government has not turned over any scientific tests upon which Dr. Brussel based his opinion about these subjects, payments for these services to Dr. Brussel, or any written psychiatric reports.

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conclusions based upon his prior fixed belief in the guilt of MacDonald, his role as an investigating criminologist, and partiality to the prosecutors.

Furthermore, Brussel insisted on examining MacDonald out of the presence of counsel, thereby depriving him of the assistance of counsel at a critical stage of these proceedings. See *United States v. Henry*, 447 U.S. 264 (1980); *Massiah v. United States*, 377 U.S. 201 (1964).

Following an *in camera* report of Dr. Brussel's findings, Judge Dupree ruled that he would exclude MacDonald's psychiatric testimony since it was shaping up as a "battle of the experts." *United States v. MacDonald*, 485 F.Supp.1087, 1094-99 (E.D.N.C. 1979)

The conduct of the prosecutors is so completely abhorrent to our conceptions of fairness and decency, let alone the Constitution, that it is inconceivable that in light of the recent decision of this Court in *Maine v. Moulton*, ____ U.S.____; 106 S.Ct. 477 (1985), it does not mandate at the minimum, the granting of a new trial, if not dismissal of all charges.

In *Moulton* the prosecution was able to claim that the reason they violated the accused's rights was to obtain evidence of crimes other than those charged in the original case. Although this Court rejected that excuse, there can be no such claim here.

In this case the prosecutors intentionally withheld from the defense and trial court the true role of the "impartial psychiatrist" they requested the Court to have examine petitioner. No greater damage could have been done to Petitioner's case.

It was obvious what Dr. Brussel would conclude since he had been telling the government the same thing for eight years before his examination. The only conclusions one could reach from the conduct of the prosecution in withholding evidence of Dr. Brussel's true role from the defense and court is that the prosecution knew

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in advance what he would report and did not want him disqualified.

Additionally, in order to circumvent MacDonald's Fifth Amendment rights against self-incrimination during this examination, the prosecutors did not wish to reveal Dr. Brussel's long standing bias against the accused thereby depriving the accused of an informed and reasoned choice in deciding whether to answer Dr. Brussel's questions. See *Miranda v. Arizona*, 384 U.S. 436 (1966).

It is clear that as a result of this elaborate sham examination Petitioner was not only denied the assistance of counsel, but also the right to present one of his most important defenses. The facts in this case are in reality many times worse that those decided by this Court in *Moulton*. Not only did the prosecution herein deliberately withhold information during trial as to the true nature of it's agent, it used the fruits of this fraud to deny the accused an essential defense.

In *Maine v. Moulton* this Court Stated, " . . . the Sixth Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent." *Id.* at 487

This court went on to state:

> "By concealing the fact that Colson [herein Brussel] was an agent of the State, the police [herein the prosecutor] denied Moulton [herein MacDonald] the opportunity to consult with counsel and thus denied him the assistance of counsel guaranteed by the Sixth Amendment." *Id.* at 488.

3. The Court of Appeals Erred in Refusing Relief Where Petitioner (1) Demonstrated That the Government Withheld, Suppressed, and Even Destroyed Potentially Exculpatory Evidence, and (2) Presented Substantial After Discovered Evidence, Any Combination of Which Could Have Resulted in a Different Jury Verdict.

1. Withheld, Suppressed and Destroyed Evidence

In addition to discovering, four years after the trial, that the trial judge had been related to one of the former prosecutors in this case and that the psychiatric examination which resulted in barring Petitioner's main defense in this case was conducted by someone who had been working as an investigating criminologist for the prosecutors for eight years before trial, Petitioner received documents under the Freedom of Information Act which showed that several key items of potentially exculpatory evidence had been "lost" or "destroyed" by government investigators and that the reports containing this information had been withheld from the defense pre-trial despite more than two dozen requests, Motions to Compel, and even extraordinary pre-trial appeals.

These items included:

(a) A bloody syringe found in the MacDonald home was never made known to the defense prior to trial.

(b) The fact that bloody clothing and boots alleged to have belonged to Helena Stoeckley were turned over to the CID, and returned to a friend of Stoeckley was never revealed to the defense prior to trial.

(c) human skin found under Mrs. MacDonald's fingernail which was "lost" by the army and this loss was not made known to the defense prior to trial.

This skin could have proven the presence of an intruder and/or eliminated MacDonald as a suspect.

(d) Photographs of the letter "G" on Helena Stoeckley's wall which were similar, according to government agents, to the printing found on the wall of the MacDonald apartment, were deliberately excluded from discovery made available to the defense prior to trial,

(e) the government failed to inform the defense prior to trial that it had destroyed seven fingerprint negatives of photographs taken inside the crime scene which could have shown that strangers were in the MacDonald apartment.

In addition to these items of physical evidence, the documents obtained years after the trial clearly indicate that the prosecutors withheld from the accused and trial court numerous documents which attested to high reliability of statements made by Helena Stoeckley.[7]

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7. (a) For a period of at least a year before and after the MacDonald murders, Helena Stoeckley gave the police of Fayetteville and Nashville good information which they relied upon to make arrests and was considered a reliable informant.

(b) Stoeckley was a prime source in a special undercover assignment investigating other policemen for the Nashville police department.

(c) As a result of information supplied by Stoeckley, a Nashville police officer was forced to resign from the police force.

(d) A C.I.D. investigator said in a written report on April 29, 1971, that "Helena is still furnishing Bowlin's unit (Nashville police) with outstanding narcotics information . . ."

(e) Stoeckley was attending classes at Aquinas Jr. College in Nashville while working with the police.

(f) DURING THE TIME SHE WAS AN "OUTSTANDING" RELIABLE INFORMANT FOR THE NASHVILLE POLICE, SHE ADMITTED TO THEM "THAT SHE HAD WINESSED THE MURDERS AND KNOWS WHO COMMITTED THE MURDERS" IN THIS CASE.

These withheld documents showed clearly that from 1969 through 1971, Helena Stoeckley was an "outstanding" reliable informant for the Nashville police and that she had admitted to them "that she had witnessed the murders and knows who committed the murders," in this case.

The withheld information assumes multi-dimensional proportions in considering its potential effects on the eventual result of the trial.

This case was presented by the government as one which was built upon "scientific" circumstantial evidence. The several items which were lost or destroyed could not only have served to undermine the credibility of the methodology and thoroughness of the government witnesses, if not lost or destroyed, but also, may have pointed to the persons who MacDonald claimed had killed his family.

In addition, the withholding of the reports of these items prior to trial foreclosed the defense from obtaining witnesses who could have testified to the significance of the loss of this evidence.

Finally, the withholding of the reports which undermined the government's case, despite numerous requests for all reports concerning physical evidence, indicates a willful intent on the prosecution to deny Petitioner a fair trial.

Here MacDonald was asked at the trial where the evidence of the intruders was, and due to the withholding of evidence by the prosecution, he was unable to answer this question.

The intentional withholding of the documents concerning Helena Stoeckley also raises multi-dimensional questions of Constitutional proportions.

Helena Stoeckley had confessed to involvement in these murders on several occasions, including a taped segment from "60 Minutes" which was filed with the lower court.

At trial, the defense sought to introduce her confessions into evidence, but the prosecutors objected claiming that under Rule 804(b)(3) Helena Stoeckley was unreliable.

Had the defense and court seen the documents which showed the high reliability of Helena Stoeckley at the time she made inculpatory statements, not only would the government's objections have been meritless, but to "a reasonable probability" the outcome of this trial could have been affected.[8]

What Petitioner believes he has demonstrated herein is a clear pattern by the government to withhold information from the defense, and that pattern thus far[9] includes the intentional withholding of evidence with regard to:

1. the relationship of the trial court to a former prosecutor in this case.

2. the surreptitious use of a government investigative criminologist as a psychiatrist to deny the accused his rights under the Fifth and Sixth Amendments to the Constitution and deny him one of his major defenses.

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8. As a result of the decision of Judge Dupree, the Court of Appeals held that Stoeckley's ". . . apparent long-standing drug habits made her an inherently unreliable witness." 688 F2d 224, 233 (1982). Had this information concerning Stoeckley's reliability in 1971 been made available by the prosecution, petitioner could have shown that as a result of the delay in the prosecution of this case, he lost this key testimony thereby prejudicing his rights to a speedy trial. This information was also withheld from this Court in the prior briefs of the government.

9. The government continues to withhold tens of thousands of documents concerning their investigation in this case. In light of the small amount of documents furnished thus far and the prejudice that has been demonstrated, one can only imagine what other violations of petitioner's rights are contained in government files which are being aggressively withheld.

3. the withholding of potentially exculpatory information with regard to loss or destruction of several items of physical evidence by government investigators.

4. the withholding of information attesting to the reliability of Helena Stoeckley in a successful attempt to keep from the jury her admissions and confessions which supported the defense that she and a group of friends actually committed these murders.

This pattern of conduct exceeds by light-years the individual instances of prosecutorial misconduct found in *Brady v. Maryland*, 373 U.S. 83 (1963); *United States v. Agurs*, 427 U.S. 97 (1976); and most recently, *United States v. Bagley* ____U.S. ____; 105 S.Ct. 3375 (1985). There is no standard of law by which these violations of Petitioner's rights could be upheld. This Court, in *Bagley*, held that a new trial is to be awarded where, "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceedings would have been different" *Id.* at 3384 (Opinion of Blackmun, J.) See also *id.* (Opinion of White, J., concurring in part and concurring in the judgment). Justice Blackmun's opinion further defined " 'a reasonable probability' as 'a probability sufficient to undermine confidence in the outcome.' " *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668 (1984), which also held that a "reasonable probability" standard is different and lower than a "more likely than not standard." *Id.*)

This court noted that the government's failure to respond to a specific request affirmatively misrepresents that the evidence does not exist, and that this misrepresentation may result in the defense abandoning "lines of independent investigation, defenses or trial strategies that it otherwise would have pursued." *Id.*

For that reason, Justice Blackmun said:

> "The reviewing court should assess the possibility that such effect might have occurred in light of the totality of the circumstances and with an awareness of the difficulty of reconstructing in a post-trial proceeding the course the defendants and the trial would have taken had the defense not been misled by the prosecutor's incomplete response." *Id.*

In the instant case it is clear that had Dr. Brussel not "examined" Petitioner, the jury would have heard expert psychiatric testimony that MacDonald was psychiatrically "incapable" of committing these crimes, and that he was sane and normal.

If the various blunders of the government investigators had not been withheld from the defense, serious questions as to the "scientific" nature of the prosecution's case could have been raised in the minds of the jurors — about the government's hypothetical case.

Finally, had the evidence of the reliability of Helena Stoeckley not been withheld from the defense and court, her confessions as to involvement with others in this crime would have been before the jury.

In reviewing this pattern of government suppression of evidence, this Court should view the suppressed evidence in light of the evidence adduced at trial and consider the cumulative effect of the suppressed evidence in the aggregate. *United States ex rel. Marzeno v. Gengler*, 574 F.2d 730 (3rd Cir. 1978).

If this evidence does not raise "a probability sufficient to undermine confidence in the outcome," it would be difficult to imagine evidence that would.

(2) After-Discovered Evidence

In addition to the above evidence, Petitioner presented substantial after-discovered evidence to the lower court. Gathered by highly qualified, former law enforcement officers, and corroborated by many witnesses (at least 35), this evidence detailed the existence of the

group which matched the descriptions given by MacDonald following the murders.

This evidence showed that the group was together on the night of the murders. It was seen going towards the crime scene shortly before the murders, and some of the group were seen running from the crime scene shortly after the murders. A motive for this group to have committed the murders was discovered.

Members of the group were found to have made admissions concerning their involvement in this crime within days of the murders.

Two members later admitted their guilt and two others made admissions as to some form of involvement. A forensic expert concluded, based upon scientific evidence, that Mrs. MacDonald was killed by a left-handed individual while MacDonald was right-handed. The group member alleged by witnesses to have killed Mrs. MacDonald, Gregg Mitchell, was left-handed. Mitchell's blood type was found on Mrs. MacDonald's hand, while Petitioner's was not.

Stoeckley gave away her bloodstained clothes and boots a few days after the murders, indicating both her involvement in the crime and her consciousness of guilt. As noted above, while acting in the capacity of being an "outstanding" undercover police informant, she admitted her participation in this crime on numerous occasions.

While there is division in the various Circuit Courts of Appeal upon the issue as to the standard which should be adopted in deciding whether to grant a new trial on the basis of newly discovered evidence,[10] it is submitted that under either the "possibility" standard or the "probability" rule, Petitioner has met his burden.

10. At this point there is a division among the circuits as to the standard which should be employed in considering after-discovered evidence. Detailed discussion of a similar problem can be found in *Standards for New Trial — Rule 33*, 59 ALR Fed. 657 (1979).

It is suggested that even under the "reasonable probability" rule enunciated in *Bagley*, this evidence is "sufficient to undermine confidence in the outcome."

In the instant case, there has been demonstrated wide-spread and pervasive governmental suppression of exculpatory and impeachment evidence which continues to date. Under all decisions of this Court, including *Bagley*, relief is required. When the fact that Petitioner has obtained substantial after-discovered evidence which supports his version of this horrendous crime is added to the consideration of this case, it is clear that there can be no confidence that a new trial would produce the same result.

Conclusion

While it is popular to lament the lack of finality of judgments in our courts, this case should stand as an example as to why the system remains the best in the world. Because of our protections, this accused has been able to demonstrate that due to governmental misconduct and judicial errors, he was wrongly convicted.

In light of the discovery of the appearance of impropriety on the part of the trial court along with his refusal to have another judge decide the issue according to our laws, public confidence in our judiciary must be undermined.

When added to a clear pattern of suppression and withholding of evidence by the prosecutors along with intentional violations of Petitioner's Constitutional rights, the very basis for the accusations against Dr. MacDonald, let alone the fairness of his trial, come into question.

Supplementing these questions is substantial after-discovered evidence which undermines the government's case.

In addition to the combination of the above factors is that, absent the malicious conduct of the government herein, both the psychiatric testimony that Dr. MacDonald was "incapable" of commiting these crimes and confessions by Helena Stoeckley could have been heard by the jury.

By any objective view Dr. MacDonald is entitled to relief by this Court.

The cause for the necessity of this relief is not the accused, but the misconduct of the government and trial court in denying him a fair trial in the first instance.

Respectfully Submitted,

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Of Counsel

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-6208

United States of America,

Appellee,

versus

Jeffrey R. MacDonald,

Appellant,

National Association of
Criminal Defense Lawyers,

Amicus Curiae.

Appeal from the United States District Court for the Eastern District of North Carolina, at Fayetteville. Franklin T. Dupree, Senior District Judge (C/A 84-41-CIV-3)

Argued October 7, 1985 Decided December 17, 1985

Before RUSSELL and MURNAGHAN, *Circuit Judges*, and HAYNSWORTH, *Senior Circuit Judge*

Brian O'Neill (Myrna K. Greenberg on brief) for Appellant; Brian M. Murtagh, Special Assistant U. S. Attorney; John F. De Pue, Department of Justice (Samuel T. Currin, U. S. Attorney on brief) for Appellee; (Efraim Margolin, Chairman, Amicus Curiae Committee, National Association of Criminal Defense Lawyers on brief) for Amicus Curiae.

HAYNSWORTH, *Senior Circuit Judge:*

Jeffrey MacDonald was convicted of the gruesome murder of his wife and two young daughters, and his convictions were affirmed on appeal. *United States v. MacDonald*, 688 F.2d 224 (4th Cir. 1982). Subsequently

he filed two motions for relief under 28 U.S.C. §2255, one motion for a new trial under Rule 33 F.R.Cr.P., and a fourth motion under 28 U.S.C. §455 to have the trial judge recuse himself. All four motions were denied.

We find no merit in this appeal, and affirm.

I.

The attempt to disqualify the trial judge was based upon the judge's relationship with Jimmy Proctor, who, at the time of the judge's appointment, was an assistant United States Attorney in the Eastern District of North Carolina and married to the judge's daughter. In apparent recognition that he should not be practicing in his father-in-law's courtroom, Proctor resigned as assistant United States Attorney in February 1971, approximately two months after the judge's appointment. At that time the MacDonald case was in the investigative stage, and Proctor had made statements indicating a belief that MacDonald should be indicted and prosecuted.

Proctor was divorced from the trial judge's daughter on July 27, 1972.

MacDonald was not indicted until January 1975, and trial before Judge Dupree did not commence until July 1979, more than eight years after Proctor's resignation as assistant United States Attorney, and almost seven years after his divorce from the trial judge's daughter.

These circumstances present no basis for a disqualification or recusal. By the time the trial judge was called upon to make any discretionary ruling in the case, Proctor had long since ceased to be a United States Attorney and ceased to be the judge's son-in-law. The earlier relationship would have disqualified either the judge or the son-in-law, and they treated it as disqualifying the son-in-law. Termination of both branches of the disqualifying relationship, however, left no vestige of the taint requiring the trial judge to disqualify himself at the time of trial in 1979 or at the time the post conviction motions

came on for a hearing in 1984. *S.J. Groves & Sons Co. v. International Brotherhood of Teamsters*, 581 F.2d 1241 (7th Cir. 1978).

II.

It is contended that MacDonald is entitled to a new trial because of evidence discovered after his conviction. This evidence consists primarily of post trial statements by Helena Stoeckley, and one each by two of her former associate drug addicts.

MacDonald's version of the events that fatal night was that his home was invaded by three men and a woman, all drunk on drugs. It was they who had attacked him and had viciously murdered his wife and children. The female invader he described as a blonde woman wearing a floppy hat and brown boots coming almost up to her knees. Helena Stoeckley had brown hair, but she sometimes wore a blonde wig, a floppy hat and high brown boots. After hearing of Dr. MacDonald's accusations, Helena Stoeckley thought that she might have been the female he described. She disposed of the wig, the hat and the boots.

Helena Stoeckley was also heavily addicted to drugs. She was a witness at the trial where she testifed that she was so heavily intoxicated with drugs in the early morning hours of the night in question that she had no idea of what she had done or where she had been. Before trial, however, she had made statements to the effect that she had been, or might have been, in the MacDonald home. The statements contained internal suggestions that they were the product of fantasy. She stated, for instance, that she held a lighted candle for illumination but "it was not dripping wax; it was dripping blood."

At the trial, the defense sought to introduce evidence of two earlier hearsay statements. They were excluded as being untrustworthy, and this court affirmed the exercise by the trial judge of his discretion in excluding them

for lack of trustworthiness. *United States v. MacDonald*, 688 F.2d at 230-34.

Helena Stoeckley has since died, apparently as the result of drug abuse. After the trial and during her lifetime, however, she continued to make conflicting statements. Sometimes she remembered nothing about what happened that night, while, apparently depending upon who questioned her, she sometimes remembered in some gory detail being with the slayers of the MacDonald mother and children. The details she gave, however, contain many inconsistencies with MacDonald's version of what occurred and with the circumstantial evidence derived from the scene.

Evidence was proffered that Greg Mitchell, a former associate of Helena Stoeckley, has explained to friends an apparent state of depression by saying that he had been involved in some murders.

Cathy Perry Williams, a former associate of Stoeckley's and a schizophrenic, allegedly confessed that she was one of the invading murderers. She claimed to have recalled evidence of that night in some detail, but the detail varied widely from the known physical facts, from Dr. MacDonald's version of what transpired, and from Helena Stoeckley's numerous confessions. Notably, the Williams statement would have had two women among four intruders; she had gone upstairs to get to the bedrooms, and the two children were boys.

To obtain a new trial on the basis of after discovered evidence, that evidence must be admissible in a new trial. There is substantial doubt that these hearsay statements would be admissible since corroborating circumstances do not clearly indicate their trustworthiness. *See* F.R.E. 804(b)(3); *United States v. Carvalho*, 742 F.2d 146 (4th Cir. 1984). However, we need go no further than to observe that the district judge found that this melange of hearsay evidence would not produce a different result in a new trial. *United States v. Lott*,751 F.2d 717 (4th Cir. 1985). That assessment was for the

district judge. There is an evidentiary basis for the finding, and there are no extraordinary circumstances that might warrant our intervention. *See United States v. Carmichael*, 726 F.2d 158 (4th Cir. 1984).

If these hearsay statements had been before the jury, it is most unlikely that the jury would have given them any credence. The circumstantial evidence made a strong case against MacDonald and demonstrated that his story was a fabrication entirely or in substantial part. Nevertheless, when his story first came out, Helena Stoeckley had no reason to doubt his truthfulness. It is clear that she thought his description of the blonde woman with the floppy hat and brown boots fit her, and a pitiable person whose memory had been completely blocked by drugs is bound to be highly suggestible. Since she could not remember where she had been or what she had been doing, MacDonald's description of the blonde woman necessarily would cause her to wonder whether she had been in the MacDonald residence and to fantasize participation in a crime as horrible as it was senseless. And, if Helena Stoeckley had been one of four intruders, some of her friends whose memories were similarly blocked by drugs might well have had similar fantasies.

Perhaps it would have been better if evidence of Stoeckley's pretrial statements had been received, as Judge Murnaghan observed in his concurring opinion, 688 F.2d at 234-36, but the district judge could appropriately find that the post trial statements were all lacking in trustworthiness and that they did not meet the materiality requirement for a new trial.

III.

Relief under §2255 was sought on the basis of claimed suppression of exculpatory evidence. The district judge considered each claim extensively and meticulously. We think he properly rejected them.

A.

Blood of MacDonald's type was found on the door of a linen closet. Inside the closet were a number of medications and a supply of syringes and needles. When one of the Army investigators was being debriefed, he said that "a half filled syringe that contained an as yet unknown fluid was located in a hall closet which also contained some evidence of blood." The defense interprets the statement to refer to a syringe containing a bloody fluid, and suggests that production and analysis of such bloody fluid might have lent some support to the claim of an intrusion by drug addicts and corroborated Cathy Perry Williams' claim that the intruders had injected a drug in MacDonald.

The statement is more readily interpreted to refer to blood on or in the closet rather than to blood in a fluid within a syringe. There were, indeed, blood stains on the closet door, and, though there were detailed inventories of the contents of the closet, there was no other reference to a syringe containing fluid of any kind. The statement was made by one who had not been a participant in making the inventory of the contents of the closet; he purported to be repeating what someone else had told him, but, according to the other investigators who actually examined the contents of the closet, there was no such syringe.

B.

In December 1970 Cathy Perry, later Williams, stabbed the soldier with whom she had been living. After she was sent away, he and a Mrs. Garcia undertook to collect Cathy's belongings. A pair of beige boots and other items were turned over to military investigators.

The beige boots were examined for blood stains or material that might connect them to the scene of the MacDonald murders. Nothing was found, and the boots were returned.

MacDonald speculates that the beige boots belonged to Helena Stoeckley rather than to Cathy Perry, and that they would be exculpatory if they were found to have been stained with blood. It is simple speculation, however, for they did not fit the description of the brown boots mentioned by MacDonald, and examination by the CID revealed no blood stains.

C.

During an autopsy performed on the body of Mrs. MacDonald, scrapings were taken from beneath her fingernails and placed in a vial. An Army investigator reported that he saw in the vial what he believed to be a small piece of skin. Thereafter, detailed laboratory analysis was performed, and the report of the analysis contains no mention of any skin.

Either the investigator was mistaken in believing that what he had seen in the vial was a small piece of skin, or the piece of skin was lost.

Interestingly, there were scratches on Dr. MacDonald's chest, which might have been made by Mrs. MacDonald if her husband were her slayer.

D.

Helena Stoeckley had refused to be fingerprinted. Seeking her prints, an investigator was dispatched to Nashville, Tennessee to examine an apartment she had recently occupied and that was being monitored by Nashville police with her consent. He found many prints and made many photographs. Apparently with her finger, she had painted words on the walls, and the investigator photographed an upper case "G" as it appeared in such words as "Good" and "Gemini." In a handwritten note, he stated that the letter seemed to resemble the "G" in the word "Pig" that had been painted on the headboard of Mrs. MacDonald's bed. That word also had been finger painted, but there was expert opinion that it had

been done by one wearing rubber gloves, for there were no traces of ridges. Dr. MacDonald had such gloves, of course, and pieces of one were found on the bed near the headboard and in a pile of bedclothing.

Prints of the photographs made in the Nashville apartment were supplied to defense counsel before trial, but, unfortunately, the investigator's handwritten note about a possible resemblance of the "G's" did not find its way into the typed explanatory material supplied to the lawyer. It is now contended that failure to supply the handwritten observation made the photographs meaningless.

Subsequent inspection in the FBI crime laboratory produced a report that neither the "G's" on the wall of the apartment in Nashville nor the "G" on the headboard contained the "inherent individual characteristics essential to a . . . meaningful comparison." Moreover, the investigator who took the Nashville photographs opined that the "G's" in Nashville resembled "G's" he had seen in MacDonald's military notebooks as well as the "G" on the headboard.

E.

The district judge concluded that the government had not deliberately suppressed anything and had acted in complete good faith. More important, however, the district judge found that this evidence did not meet the materiality requirements of *Brady v. Maryland*, 373 U.S. 83 (1963), and *United States v. Agurs*, 427 U.S. 97 (1976). We agree, and our view is not altered by the more recent case of *United States v. Bagley*, ____U.S. ____(July 2, 1985).

IV.

MacDonald also claims that his Fifth and Sixth Amendment rights were violated when a psychiatrist examined him during trial. There had been an agreement

upon the examination, but MacDonald now claims that the psychiatrist was a "government investigator" who asked many questions about the facts and disclosed MacDonald's answers to the prosecution. There is no support for the contention except speculation, and the district court found that the psychiatrist did not depart from his properly assigned role.

V.

In much greater detail than we, the district judge considered every contention that MacDonald advanced. The care with which it was done is evident, and we may conclude this much briefer opinion with the statement that there is no basis upon which any ruling in this case by a meticulous district judge can be overturned.

AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-6208

United States of America,

Appellee,

versus

Jeffrey R. MacDonald,

Apppellant

ORDER

Upon consideration of the petition for rehearing, no request for a poll of the court having been made on the suggestion for rehearing *en banc*, and with the concurrence of Judge Russell and Judge Murnaghan,

IT IS ORDERED that the petition for rehearing be, and it hereby is, denied.

Clement F. Haynsworth, Jr.
U. S. Circuit Judge

January 27, 1986